

Mar 26, 2019

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MONICA J. S.,

Plaintiff,

v.

COMMISSIONER OF SOCIAL
SECURITY,

Defendant.

NO: 2:18-CV-82-FVS

ORDER DENYING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND GRANTING
DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

BEFORE THE COURT are the parties' cross-motions for summary judgment. ECF Nos. 12, 13. This matter was submitted for consideration without oral argument. Plaintiff is represented by attorney Cory J. Brandt. Defendant is represented by Special Assistant United States Attorney Jeffrey R. McClain. The Court, having reviewed the administrative record and the parties' briefing, is fully informed. For the reasons discussed below, Plaintiff's Motion, ECF No. 12, is denied and Defendant's Motion, ECF No. 13, is granted.

JURISDICTION

Plaintiff Monica J. S.¹ (Plaintiff), filed for disability insurance benefits (DIB) and supplemental security income (SSI) on August 4, 2014, alleging an onset date of January 10, 2011. Tr. 212-15, 274. Benefits were denied initially, Tr. 138-40, and upon reconsideration, Tr. 145-46, 148-49. Plaintiff appeared at a hearing before an administrative law judge (ALJ) on December 1, 2016. Tr. 44-74. On December 27, 2016, the ALJ issued an unfavorable decision, Tr. 24-36, and on January 17, 2018, the Appeals Council denied review. Tr. 1-5. The matter is now before this Court pursuant to 42 U.S.C. § 405(g); 1383(c)(3).

BACKGROUND

The facts of the case are set forth in the administrative hearing and transcripts, the ALJ's decision, and the briefs of Plaintiff and the Commissioner, and are therefore only summarized here.

Plaintiff was born in 1982 and was 34 years old at the time of the hearing. Tr. 212. She has a high school diploma. Tr. 70. She has work experience as a caregiver for adults and children, as a meat counter clerk, and in retail, telemarketing, and electronics manufacturing. Tr. 65-70. She alleges she cannot

¹In the interest of protecting Plaintiff's privacy, the Court will use Plaintiff's first name and last initial, and, subsequently, Plaintiff's first name only, throughout this decision.

1 work due to pain while walking, standing, lifting, bending, and going up and down
2 stairs. Tr. 258. Because of pain, she becomes overwhelmed and tired easily. Tr.
3 258.

4 Plaintiff testified that she has pain and numbness in her left hip. Tr. 57. She
5 sometimes loses her balance because of the lack of sensation. Tr. 58. She has a hard
6 time walking over uneven surfaces and curbs. Tr. 58. She uses a walker and has a
7 disabled parking permit. Tr. 58-59. She testified she can walk only short distances
8 because walking makes her tired and causes pain. Tr. 59. Sitting also causes pain.
9 Tr. 59-60. She lies down at least four times a day for 20 minutes at a time. Tr. 60.
10 She has a caregiver who helps with lifting and housework twice a week. Tr. 60.

11 Plaintiff testified her memory has been getting worse. Tr. 61. She got lost
12 driving to her mother's house which she visits frequently. Tr. 62. She cannot focus.
13 Tr. 62.

14 **STANDARD OF REVIEW**

15 A district court's review of a final decision of the Commissioner of Social
16 Security is governed by 42 U.S.C. § 405(g). The scope of review under § 405(g) is
17 limited; the Commissioner's decision will be disturbed "only if it is not supported by
18 substantial evidence or is based on legal error." *Hill v. Astrue*, 698 F.3d 1153, 1158
19 (9th Cir. 2012). "Substantial evidence" means "relevant evidence that a reasonable
20 mind might accept as adequate to support a conclusion." *Id.* at 1159 (quotation and
21 citation omitted). Stated differently, substantial evidence equates to "more than a

1 mere scintilla[,] but less than a preponderance.” *Id.* (quotation and citation omitted).
2 In determining whether the standard has been satisfied, a reviewing court must
3 consider the entire record as a whole rather than searching for supporting evidence in
4 isolation. *Id.*

5 In reviewing a denial of benefits, a district court may not substitute its
6 judgment for that of the Commissioner. *Edlund v. Massanari*, 253 F.3d 1152, 1156
7 (9th Cir. 2001). If the evidence in the record “is susceptible to more than one
8 rational interpretation, [the court] must uphold the ALJ’s findings if they are
9 supported by inferences reasonably drawn from the record.” *Molina v. Astrue*, 674
10 F.3d 1104, 1111 (9th Cir. 2012). Further, a district court “may not reverse an ALJ’s
11 decision on account of an error that is harmless.” *Id.* An error is harmless “where it
12 is inconsequential to the [ALJ’s] ultimate nondisability determination.” *Id.* at 1115
13 (quotation and citation omitted). The party appealing the ALJ’s decision generally
14 bears the burden of establishing that it was harmed. *Shinseki v. Sanders*, 556 U.S.
15 396, 409-10 (2009).

16 **FIVE-STEP EVALUATION PROCESS**

17 A claimant must satisfy two conditions to be considered “disabled” within the
18 meaning of the Social Security Act. First, the claimant must be “unable to engage in
19 any substantial gainful activity by reason of any medically determinable physical or
20 mental impairment which can be expected to result in death or which has lasted or
21 can be expected to last for a continuous period of not less than twelve months.” 42

1 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). Second, the claimant’s impairment must
2 be “of such severity that he is not only unable to do his previous work[,] but cannot,
3 considering his age, education, and work experience, engage in any other kind of
4 substantial gainful work which exists in the national economy.” 42 U.S.C. §§
5 423(d)(2)(A), 1382c(a)(3)(B).

6 The Commissioner has established a five-step sequential analysis to determine
7 whether a claimant satisfies the above criteria. *See* 20 C.F.R. §§ 404.1520(a)(4)(i)-
8 (v), 416.920(a)(4)(i)-(v). At step one, the Commissioner considers the claimant’s
9 work activity. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If the claimant is
10 engaged in “substantial gainful activity,” the Commissioner must find that the
11 claimant is not disabled. 20 C.F.R. §§ 404.1520(b), 416.920(b).

12 If the claimant is not engaged in substantial gainful activity, the analysis
13 proceeds to step two. At this step, the Commissioner considers the severity of the
14 claimant’s impairment. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii). If the
15 claimant suffers from “any impairment or combination of impairments which
16 significantly limits [his or her] physical or mental ability to do basic work
17 activities,” the analysis proceeds to step three. 20 C.F.R. §§ 404.1520(c),
18 416.920(c). If the claimant’s impairment does not satisfy this severity threshold,
19 however, the Commissioner must find that the claimant is not disabled. 20 C.F.R.
20 §§ 404.1520(c), 416.920(c).

1 At step three, the Commissioner compares the claimant's impairment to
2 severe impairments recognized by the Commissioner to be so severe as to preclude a
3 person from engaging in substantial gainful activity. 20 C.F.R. §§
4 404.1520(a)(4)(iii), 416.920(a)(4)(iii). If the impairment is as severe or more severe
5 than one of the enumerated impairments, the Commissioner must find the claimant
6 disabled and award benefits. 20 C.F.R. §§ 404.1520(d), 416.920(d).

7 If the severity of the claimant's impairment does not meet or exceed the
8 severity of the enumerated impairments, the Commissioner must pause to assess the
9 claimant's "residual functional capacity." Residual functional capacity (RFC),
10 defined generally as the claimant's ability to perform physical and mental work
11 activities on a sustained basis despite his or her limitations, 20 C.F.R. §§
12 404.1545(a)(1), 416.945(a)(1), is relevant to both the fourth and fifth steps of the
13 analysis.

14 At step four, the Commissioner considers whether, in view of the claimant's
15 RFC, the claimant is capable of performing work that he or she has performed in the
16 past (past relevant work). 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). If the
17 claimant is capable of performing past relevant work, the Commissioner must find
18 that the claimant is not disabled. 20 C.F.R. §§ 404.1520(f), 416.920(f). If the
19 claimant is incapable of performing such work, the analysis proceeds to step five.

20 At step five, the Commissioner should conclude whether, in view of the
21 claimant's RFC, the claimant is capable of performing other work in the national

1 economy. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v). In making this
2 determination, the Commissioner must also consider vocational factors such as the
3 claimant's age, education and past work experience. 20 C.F.R. §§
4 404.1520(a)(4)(v), 416.920(a)(4)(v). If the claimant is capable of adjusting to other
5 work, the Commissioner must find that the claimant is not disabled. 20 C.F.R. §§
6 404.1520(g)(1), 416.920(g)(1). If the claimant is not capable of adjusting to other
7 work, analysis concludes with a finding that the claimant is disabled and is therefore
8 entitled to benefits. 20 C.F.R. §§ 404.1520(g)(1), 416.920(g)(1).

9 The claimant bears the burden of proof at steps one through four above.
10 *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999). If the analysis proceeds to
11 step five, the burden shifts to the Commissioner to establish that (1) the claimant is
12 capable of performing other work; and (2) such work "exists in significant numbers
13 in the national economy." 20 C.F.R. §§ 404.1560(c)(2), 416.960(c)(2); *Beltran v.*
14 *Astrue*, 700 F.3d 386, 389 (9th Cir. 2012).

15 **ALJ'S FINDINGS**

16 At step one, the ALJ found Plaintiff did not engage in substantial gainful
17 activity since January 10, 2011, the alleged onset date. Tr. 26. At step two, the ALJ
18 found that Plaintiff has the following severe impairments: gestational diabetes
19 mellitus, obesity, major depressive disorder vs post-partum depression, and anxiety.
20 Tr. 26. At step three, the ALJ found that Plaintiff does not have an impairment or
21

1 combination of impairments that meets or medically equals the severity of a listed
2 impairment. Tr. 27.

3 The ALJ then found that Plaintiff has the residual functional capacity to
4 perform sedentary work with the following additional limitations:

5 [T]he claimant can perform occasional postural activities, but never
6 climb ladders, rope, or scaffolds. The claimant should avoid
7 concentrated exposure to industrial vibrations and hazards. The
8 claimant is able to understand, remember, and carry out simple, routine,
9 repetitive tasks and instructions. The claimant is able to maintain
10 attention and concentration on simple routine tasks for 2 hour intervals
11 between regularly scheduled breaks for an 8 hour work day/40 hour
12 work week. The claimant can have only occasional changes in a work
13 setting/routine, and no fast-paced production rate (defined as assembly
14 line type work).

15 Tr. 29.

16 At step four, the ALJ found that Plaintiff is able to perform any past relevant
17 work as a telemarketer. Tr. 35. Therefore, at step five, the ALJ concluded that
18 Plaintiff has not been under a disability, as defined in the Social Security Act, from
19 January 10, 2011, through the date of the decision. Tr. 35.

20 ISSUES

21 Plaintiff seeks judicial review of the Commissioner's final decision denying
disability income benefits under Title II and supplemental security income under
Title XVI of the Social Security Act. ECF No. 12. Plaintiff raises the following
issues for review:

1. Whether the ALJ properly identified all of Plaintiff's severe
impairments;

1 regulations. *See e.g. Edlund*, 253 F.3d at 1159-60; *Fair v. Bowen*, 885 F.2d 597,
2 603 (9th Cir. 1989); *Key v. Heckler*, 754 F.2d 1545, 1549050 (9th Cir. 1985).

3 The ALJ found Plaintiff has the severe impairments of gestational diabetes,
4 obesity, depression, and anxiety. Tr. 26. The ALJ also noted Plaintiff had chronic
5 lower back pain symptoms but found the treatment notes reflect no objective
6 findings to support any limitations due to back issues. Tr. 27. Plaintiff contends the
7 ALJ should have also identified her hip condition, femoral acetabular impingement,
8 as a severe impairment. ECF No. 12 at 11. Plaintiff notes various symptoms and
9 observes that reviewing physicians Norman Staley, M.D., and Wayne Hurley, M.D.,
10 both opined her primary severe impairment is “dysfunction of a major joint.” ECF
11 No. 12 at 12 (citing Tr. 96, 111). Indeed, Dr. Staley and Dr. Hurley acknowledged
12 Plaintiff’s physical limitations are due to femoral acetabular impingement of
13 bilateral hips, lumbago, and obesity. Tr. 84, 114-15.

14 Even if the ALJ should have included Plaintiff’s hip condition as a severe
15 impairment, any error is harmless. If the ALJ erred by not finding an impairment
16 severe at step two, reversal may not be required if the step is resolved in the
17 claimant’s favor. *See Buck*, 869 F.3d at 1048-49; *Stout v. Comm’r of Soc. Sec.*
18 *Admin.*, 454 F.3d 1050, 1055 (9th Cir. 2006); *Burch v. Barnhart*, 400 F.3d 676, 682
19 (9th Cir. 2005). Here, the ALJ resolved step two in Plaintiff’s favor by finding there
20 are severe impairments, continuing the sequential evaluation, and considering the
21 symptoms cited by Plaintiff. Tr. 30-34. Furthermore, the ALJ credited the opinions

1 of Dr. Staley and Dr. Hurley and included all of limitations they assessed in the RFC
2 finding.² Tr. 29, 83-85, 113-15. Plaintiff has not identified any additional
3 limitations supported by the record due to her hip condition, and therefore the
4 outcome would be the same even if femoral acetabular impingement is credited as a
5 severe impairment. Thus, any error at step two regarding Plaintiff's hip problem is
6 harmless. *Stout*, 454 F.3d at 1056; *Burch*, 400 F.3d at 682; *Curry v. Sullivan*, 925
7 F.2d 1127, 1131 (9th Cir. 1990) (where corrected error does not change the
8 outcome, the error is harmless).

9 **B. Medical Opinion Evidence**

10 Plaintiff contends the ALJ failed to properly consider the opinion of
11 examining physician Kevin Weeks, D.O. ECF No. 12 at 13-14. There are three
12 types of physicians: "(1) those who treat the claimant (treating physicians); (2) those
13

14 ²Dr. Staley and Dr. Hurley both opined Plaintiff is limited to occasional and
15 frequent lifting and carrying of 10 pounds; standing or walking for two hours and
16 sitting for six hours in an eight-hour day, with postural limitations of occasional
17 climbing ramps or stairs, balancing, stooping, kneeling, crouching, and crawling,
18 but never climbing ladders, ropes, or scaffolds, and must avoid concentrated
19 exposure to hazards. Tr. 83-85, 113-15. These limitations are consistent with RFC
20 finding of sedentary work with the same postural limitations. Tr. 29; *see* 20 C.F.R.
21 §§ 404.1567, 416.967.

1 who examine but do not treat the claimant (examining physicians); and (3) those
2 who neither examine nor treat the claimant but who review the claimant's file
3 (nonexamining or reviewing physicians)." *Holohan v. Massanari*, 246 F.3d 1195,
4 1201-02 (9th Cir. 2001) (brackets omitted). "Generally, a treating physician's
5 opinion carries more weight than an examining physician's, and an examining
6 physician's opinion carries more weight than a reviewing physician's." *Id.* "In
7 addition, the regulations give more weight to opinions that are explained than to
8 those that are not, and to the opinions of specialists concerning matters relating to
9 their specialty over that of nonspecialists." *Id.* (citations omitted).

10 If a treating or examining physician's opinion is uncontradicted, an ALJ may
11 reject it only by offering "clear and convincing reasons that are supported by
12 substantial evidence." *Bayliss v. Barnhart*, 427 F.3d 1211, 1216 (9th Cir. 2005).
13 "However, the ALJ need not accept the opinion of any physician, including a
14 treating physician, if that opinion is brief, conclusory and inadequately supported by
15 clinical findings." *Bray v. Comm'r of Soc. Sec. Admin.*, 554 F.3d 1219, 1228
16 (internal quotation marks and brackets omitted). "If a treating or examining doctor's
17 opinion is contradicted by another doctor's opinion, an ALJ may only reject it by
18 providing specific and legitimate reasons that are supported by substantial
19 evidence." *Bayliss*, 427 F.3d at 1216 (citing *Lester v. Chater*, 81 F.3d 821, 830-31
20 (9th Cir. 1995)).
21

1 Dr. Weeks examined Plaintiff and prepared a report in December 2014. Tr.
2 470-75. Dr. Weeks diagnosed chronic hip pain due to femoral acetabular
3 impingement bilaterally and lumbago with preserved range of motion. Tr. 475. He
4 opined Plaintiff could stand or walk for two hours in an eight-hour workday; sit for
5 four to six hours in an eight-hour workday; needs a walker and cane for balance and
6 pain; can lift and carry 10 pounds occasionally and frequently; cannot climb,
7 balance, stoop, kneel, crawl or crouch due to impingement of her hips; and must
8 avoid working around heights and heavy machinery. Tr. 475.

9 The ALJ gave significant weight to Dr. Weeks' opinion that Plaintiff is
10 limited to sedentary work. Tr. 34. However, the ALJ gave no weight to any
11 limitations resulting in a restriction to less than sedentary work³. Tr. 34. Thus, the
12 ALJ gave no weight to the postural limitations assessed by Dr. Weeks. Tr.

13 Because Dr. Week's opinion regarding postural limitations was contradicted
14 by the opinion of the reviewing physicians, Wayne Hurley, M.D., Tr. 83-85, and
15

16 ³“Sedentary work involves lifting no more than 10 pounds at a time and
17 occasionally lifting or carrying articles like docket files, ledgers, and small tools.
18 Although a sedentary job is defined as one which involves sitting, a certain amount
19 of walking and standing is often necessary in carrying out job duties. Jobs are
20 sedentary if walking and standing are required occasionally and other sedentary
21 criteria are met.” 20 C.F.R. §§ 404.1567, 416.967.

1 Norman Staley, M.D., Tr. 113-15, the ALJ was required to provide specific and
2 legitimate reasons for rejecting that portion of Dr. Weeks' opinion.⁴ *Bayliss*, 427
3 F.3d at 1216.

4 The ALJ rejected the postural limitations assessed by Dr. Weeks because
5 "there is absolutely no basis . . . to totally preclude all postural activities." Tr. 34.
6 An ALJ may discredit treating physicians' opinions that are unsupported by the
7 record as a whole or by objective medical findings. *Batson v. Comm'r of Soc. Sec.*
8 *Admin.*, 359 F.3d 1190, 1195 (9th Cir. 2004). The ALJ observed that Plaintiff has
9 three young children ages three, one, and a newborn, and the record reflects that
10 Plaintiff cares for them daily. Tr. 34, 310 ("full time mom"), 451 ("full time

11 _____
12 ⁴ Plaintiff contends on reply that "a non-examining doctor's opinion cannot be used
13 to reject the opinion of an examining doctor because it does not qualify as
14 substantial evidence on its own." ECF No. 14 at 4 (citing *Lester*, 81 F.3d at 831).
15 Plaintiff misconstrues *Lester*, which actually says, "[i]n the absence of record
16 evidence to support it, the nonexamining medical advisor's testimony does not by
17 itself constitute substantial evidence that warrants a rejection of either the treating
18 doctor's or the examining psychologist's opinion." *Id.* at 832 (citations omitted).
19 In this case, the ALJ cited "record evidence" in addition to the nonexamining
20 opinions in giving little weight given to a portion of Dr. Weeks' opinion. Tr. 34.

1 mom”), 466 (arrives for appointment “pushing stroller with young child”), 479
2 (“spends most of her time during the day caring for her two young children), 662
3 (arrives for appointment with two young children and is pregnant; “she is going to
4 stop work on 3/26/16 and would like a note for her employer” and “would like to
5 be re-hired at a later date”).

6 The ALJ noted that being a full-time mother requires Plaintiff to dress, feed,
7 and bathe her children, change diapers, transfer one or more children in and out of
8 a crib, lift one or more children in and out of a high chair, and hold her children.
9 Tr. 34. An ALJ may discount a medical source opinion to the extent it conflicts
10 with the claimant’s daily activities. *Morgan v. Comm’r of Soc. Sec. Admin.*, 169
11 F.3d 595, 601-02 (9th Cir. 1999). The ALJ reasonably inferred that “these daily
12 child care activities require at a minimum occasional bending, stooping, crouching,
13 reaching and occasional lifting of 10 pounds or more.” Tr. 34. The ALJ’s
14 inference is reasonable and supported by the record and this is a specific,
15 legitimate reason for giving no weight to the postural limitations assessed by Dr.
16 Weeks.

17 Plaintiff notes the record reflects “that during a typical day she helps her
18 children get ready for school, plays with them on the floor and helps the children
19 while sitting.” ECF No. 12 at 13 (citing Tr. 472). She reported “trouble carrying
20 her children” and “difficulty taking her kids to the park.” Tr. 656. Neither of these
21 records support Dr. Weeks’ finding that Plaintiff can perform zero balancing,

1 stooping, kneeling, crawling, climbing, or crouching due to hip pain. Helping
2 young children get ready for school by nature requires some postural activity.
3 Similarly, playing on the floor requires stooping or crouching. Dr. Weeks did not
4 find Plaintiff cannot carry and the ALJ included a limit on carrying in the RFC.
5 Tr. 29, 475. “[D]ifficulty taking her kids to a park” does not implicate any specific
6 functional limitation. Tr. 656. The ALJ acknowledged Plaintiff may have
7 difficulty with some postural activities and limited postural activities to occasional
8 in the RFC, with an additional limitation to never climb ladders, rope, or scaffolds.
9 Tr. 29.

10 Furthermore, even if the ALJ erred in rejecting the postural limitations
11 assessed by Dr. Weeks (and the Court does not so conclude), any error would be
12 harmless. The erroneous omission of postural limitations from an RFC for
13 sedentary work is harmless “since sedentary jobs require infrequent stooping,
14 balancing, crouching, or climbing.” *Stubbs-Danielson v. Astrue*, 539 F.3d 1169,
15 1174 (9th Cir. 2008); *see also* Social Security Ruling (S.S.R.) 96–9p, at 8 (postural
16 limitations of kneeling, climbing, balancing, crouching, or crawling would not
17 erode the occupational base for a full range of unskilled sedentary work; most
18 unskilled sedentary occupations require very little to occasional stooping).

19 Plaintiff also notes the ALJ misstated Dr. Weeks’ finding regarding carrying
20 by asserting “there is absolutely no basis to limit carrying to less than 10 pounds.”
21 Tr. 34; ECF No. 12 at 14. Dr. Weeks found Plaintiff’s maximum lifting and

1 carrying capacity is 10 pounds occasionally and frequently. Tr. 475. The error is
2 harmless because the limitation to sedentary work in the RFC means lifting and
3 carrying is limited to 10 pounds, which is consistent with Dr. Weeks' lifting and
4 carrying assessment. 20 C.F.R. §§ 404.1567, 416.967. An error is harmless when
5 it is inconsequential to the ultimate nondisability determination. *See Carmickle v.*
6 *Comm'r of Soc. Sec. Admin*, 533 F.3d 1155, 1162 (9th Cir. 2008); *Stout*, 454 F.3d
7 at 1055; *Batson*, 359 F.3d at 1195-97.

8 Plaintiff also notes Dr. Weeks' finding that Plaintiff had difficulty with
9 balance and was unable to squat or hop during her physical examination. ECF No.
10 12 at 14. Plaintiff asserts Dr. Weeks' opinion is based "off the records he
11 reviewed, his objective findings, as well as [Plaintiff's] subjective complaints."
12 ECF No. 12 at 14. Plaintiff makes no argument, but presumably Plaintiff's point is
13 that Dr. Weeks' findings are supported by his exam and review of the record.
14 However, even if the few findings noted by Plaintiff supported the conclusion that
15 Plaintiff can never engage in postural activities (and the Court does not so find),
16 that would not negate the ALJ's conclusion based on the record overall that
17 Plaintiff's child care activities contradict Dr. Weeks' finding regarding postural
18 limitations. The ALJ gave specific, legitimate reasons supported by substantial
19 evidence for rejecting the postural limitations assessed by Dr. Weeks.

20 **C. Symptom Claims**

21

1 Plaintiff contends the ALJ improperly rejected her symptom claims. ECF
2 No. 12 at 14-19. An ALJ engages in a two-step analysis to determine whether a
3 claimant's testimony regarding subjective pain or symptoms is credible. "First, the
4 ALJ must determine whether there is objective medical evidence of an underlying
5 impairment which could reasonably be expected to produce the pain or other
6 symptoms alleged." *Molina*, 674 F.3d at 1112 (internal quotation marks omitted).
7 "The claimant is not required to show that her impairment could reasonably be
8 expected to cause the severity of the symptom she has alleged; she need only show
9 that it could reasonably have caused some degree of the symptom." *Vasquez v.*
10 *Astrue*, 572 F.3d 586, 591 (9th Cir. 2009) (internal quotation marks omitted).

11 Second, "[i]f the claimant meets the first test and there is no evidence of
12 malingering, the ALJ can only reject the claimant's testimony about the severity of
13 the symptoms if [the ALJ] gives 'specific, clear and convincing reasons' for the
14 rejection." *Ghanim v. Colvin*, 763 F.3d 1154, 1163 (9th Cir. 2014) (internal
15 citations and quotations omitted). "General findings are insufficient; rather, the
16 ALJ must identify what testimony is not credible and what evidence undermines
17 the claimant's complaints." *Id.* (quoting *Lester*, 81 F.3d at 834; *see also Thomas v.*
18 *Barnhart*, 278 F.3d 947, 958 (9th Cir. 2002) ("[T]he ALJ must make a credibility
19 determination with findings sufficiently specific to permit the court to conclude
20 that the ALJ did not arbitrarily discredit claimant's testimony."). "The clear and
21 convincing [evidence] standard is the most demanding required in Social Security

1 cases.” *Garrison v. Colvin*, 759 F.3d 995, 1015 (9th Cir. 2014) (quoting *Moore v.*
2 *Comm’r of Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002)).

3 In assessing a claimant’s symptom complaints, the ALJ may consider, *inter*
4 *alia*, (1) the claimant’s reputation for truthfulness; (2) inconsistencies in the
5 claimant’s testimony or between his testimony and his conduct; (3) the claimant’s
6 daily living activities; (4) the claimant’s work record; and (5) testimony from
7 physicians or third parties concerning the nature, severity, and effect of the
8 claimant’s condition. *Thomas*, 278 F.3d at 958-59.

9 This Court finds that the ALJ provided specific, clear, and convincing
10 reasons for finding Plaintiff’s statements concerning the intensity, persistence, and
11 limiting effects of her symptoms less than fully persuasive. Tr. 34.

12 First, the ALJ found the medical evidence indicates Plaintiff’s impairments
13 are not as severe as alleged. Tr. 30-31. While subjective pain testimony may not
14 be rejected solely because it is not corroborated by objective medical findings, the
15 medical evidence is a relevant factor in determining the severity of a claimant’s
16 pain and its disabling effects. *Rollins v. Massanari*, 261 F.3d 853, 857 (9th Cir.
17 2001); 20 C.F.R. §§ 404.1529(c)(2), 416.929(c)(2) (2011). The ALJ discussed the
18 medical record in detail.⁵ Tr. 30-31. In July and August 2014, Plaintiff

19
20 ⁵The ALJ discussed Plaintiff’s physical and mental impairments. Tr. 30-31. As
21 noted by Defendant, Plaintiff does not challenge any of the findings related to her

1 complained of pain and numbness in her bilateral hips, legs, and low back. Tr. 30,
2 305. She reported “the pain often limits her ability to walk, climb stairs, raise her
3 legs and bend.” Tr. 30, 305. The ALJ noted, however, that diagnostic x-rays of
4 her hips from July 2014 showed no acute fracture, Tr. 307-08, and an August 2014
5 lumbar spine MRI was unremarkable, Tr. 314. Tr. 30. In October 2014, Plaintiff
6 had a neuromuscular medicine consultation for complaints of leg dysfunction after
7 the birth of her first child in 2011. Tr. 450. She complained of pain, instability,
8 weakness, and numbness from her lumbar spine through her hips and legs. Tr.
9 450. Scott Carlson, M.D., found all objective tests results were normal or minimal,
10 Tr. 454, including a negative hip arthrogram. Tr. 454, 508. He concluded, “I don’t
11 find clinical or electrodiagnostic evidence of active or remote nerve injury in this
12 patient” and “[a]t this point there is no neuromuscular etiology for her leg
13 complaints or abnormal gait.” Tr. 454. Additionally, Dr. Carlson found “evidence
14 of some embellishment on examination including gait and power examination
15 which is not neurologic.” Tr. 454.

16
17
18 _____
19 mental impairments and any challenge to the ALJ’s evaluation of her mental
20 impairments is therefore waived. *Bray v. Comm’r of Soc. Sec. Admin.*, 554 F.3d
21 1219, 1226 n.7 (9th Cir. 2009) (noting any argument not made in the opening brief
is waived).

1 The ALJ also noted that in 2015 and 2016, Plaintiff complained of pain in
2 her upper extremities and received chiropractic care which helped decrease pain
3 and improved range of motion. Tr. 31, 493-506, 509-17, 590-608. In March 2016,
4 Plaintiff was 14 weeks pregnant and a neurology exam showed Plaintiff had a
5 normal gait, negative Romberg, no atrophy, full muscle strength in the upper and
6 lower extremities, and no sensory or reflex deficits. Tr. 31, 615, 618. In
7 September 2016, Plaintiff's one-month postpartum exam was normal. Tr. 570.
8 Plaintiff saw Mary Bergrum, M.D., in October 2016 regarding diabetes. Tr. 656-
9 67. She was in no distress and on exam her gait was normal. Tr. 657. In
10 November 2016, her musculoskeletal and neurological systems were normal on
11 exam. Tr. 575, 577-79.

12 The ALJ concluded that overall, although Plaintiff may have limits on the
13 type of work she can perform, the objective findings do not support Plaintiff's
14 allegations of an inability to do all work. Tr. 30. Plaintiff insists "there *were*
15 objective findings" of hip pain and that the ALJ "failed to recognize" that pain is
16 subjective. ECF No 12 at 16. The ALJ did not conclude that there are is no
17 objective evidence of hip pain, only that the objective evidence does not support
18 the level of limitation alleged. Tr. 30-31, 34-35. Furthermore, the ALJ
19 acknowledged the subjectivity of pain and noted that when statements about
20 symptoms and pain are not supported by objective medical evidence, other
21

1 evidence must be considered. Tr. 30. However, as noted *supra*, that does not
2 mean objective findings are irrelevant or not to be considered.

3 Plaintiff also notes the “sought treatment repeatedly for her pain,” ECF No.
4 12 at 16, which is not objective evidence. Plaintiff cites the findings of Dr. Weeks,
5 but that opinion was partially rejected by the ALJ for legally sufficient reasons,
6 discussed *supra*, and was also largely credited. ECF No. 12 at 16; Tr. 34, 475.
7 Lastly, Plaintiff suggests the ALJ improperly considered Dr. Carlson’s finding of
8 some embellishment on exam since Dr. Carlson “did not dismiss” Plaintiff’s
9 complaints. ECF No. 12 at 16. Despite Plaintiff’s assertions to the contrary, the
10 ALJ did not dismiss Plaintiff’s complaints, as the ALJ gave Plaintiff the benefit of
11 the doubt and credited most of Dr. Weeks’ opinion, which is the most restrictive
12 medical opinion in the record. Tr. 32, 34. The ALJ’s finding that the objective
13 evidence does not support the degree of limitation alleged by Plaintiff is based on a
14 reasonable interpretation of the record and substantial evidence.

15 Second, the ALJ found Plaintiff’s daily activities indicate her impairments
16 are not as severe as alleged. Tr. 30-31. It is reasonable for an ALJ to consider a
17 claimant’s activities which undermine claims of totally disabling pain in assessing
18 a claimant’s symptom complaints. *See Rollins*, 261 F.3d at 857. However, it is
19 well-established that a claimant need not “vegetate in a dark room” in order to be
20 deemed eligible for benefits. *Cooper v. Bowen*, 815 F.2d 557, 561 (9th Cir. 1987).
21 Notwithstanding, if a claimant is able to spend a substantial part of her day

1 engaged in pursuits involving the performance of physical functions that are
2 transferable to a work setting, a specific finding as to this fact may be sufficient to
3 discredit an allegation of disabling excess pain. *Fair*, 885 F.2d at 603.

4 Furthermore, "[e]ven where [Plaintiff's daily] activities suggest some difficulty
5 functioning, they may be grounds for discrediting the claimant's testimony to the
6 extent that they contradict claims of a totally debilitating impairment." *Molina*,
7 674 F.3d at 1113.

8 The ALJ noted Plaintiff maintains the ability to perform tasks such as
9 attending to her personal needs, preparing meals, performing household duties,
10 shopping in stores, watching television, reading, spending time with family, and
11 taking care of children. Tr. 30. The ALJ found that although Plaintiff may have
12 some limitations, these activities undermine her allegations of significant difficulty
13 with exertional activities. Tr. 30, 258-61, 379. Plaintiff contends her activities are
14 qualified by her physical difficulties. ECF No. 12 at 17; Tr. 458, 479, 513, 516.
15 For example, when she goes to the grocery store, she uses an electric cart, and she
16 has a caregiver who helps with basic chores in her home once or twice a week. Tr.
17 58-60, 271, 479. In this case, particularly in light of Plaintiff's allegations and the
18 RFC finding, the ALJ's finding regarding daily activities is reasonable and based
19 on substantial evidence.

20 Third, the ALJ found Plaintiff's statements to her providers varied from her
21 testimony at the hearing. Tr. 43-44. In evaluating a claimant's symptom claims,

1 an ALJ may consider the consistency of an individual's own statements made in
2 connection with the disability review process with any other existing statements or
3 conduct made under other circumstances. *Smolen v. Chater*, 80 F.3d 1273, 1284
4 (9th Cir. 1996); *Thomas*, 278 F.3d at 958-59. For example, the ALJ noted that
5 Plaintiff testified she has problems with balance and falls, Tr. 58, but in September
6 2015 she denied poor balance upon exam, Tr. 539. Tr. 31. On reply, Plaintiff
7 notes these statements were made almost a year apart but fails to identify any error
8 in the ALJ's interpretation of the evidence. ECF No. 14 at 6. Plaintiff also asserts
9 this record is distinguishable because "her physical symptoms were not the focus
10 of the appointment." ECF No. 14 at 6. However, it would be reasonable to expect
11 that Plaintiff's responses to questions about her symptoms would be the same
12 regardless of the provider or the purpose of the visit.⁶ This not does not rebut the
13 ALJ's reasonable interpretation of the evidence and this is a clear and convincing
14 reason supported by substantial evidence.

15
16

17 ⁶ Plaintiff saw treating ARNP Angella Julagay for concerns related to her memory
18 in September 2015. Tr. 536. In addition to depression screening, Ms. Julagay
19 reviewed Plaintiff's current problems, medications, performed a review of systems,
20 physical exam, obtained vital signs, and listed her impression and
21 recommendations for Plaintiff's mental and physical health. Tr. 536-40.

1 Fourth, the ALJ found Plaintiff's response to conservative treatment
2 undermines her allegations. Tr. 34. Claims about disabling pain are undermined
3 by favorable response to conservative treatment. *Tommasetti v. Astrue*, 533 F.3d
4 1035, 1039-1040 (9th Cir. 2008); *see also Parra v. Astrue*, 481 F.3d 742, 750-51
5 (9th Cir. 2007) (finding "evidence of 'conservative treatment' is sufficient to
6 discount a claimant's testimony regarding severity of an impairment"). The ALJ
7 found that Plaintiff has received only conservative treatment and her conditions
8 have stabilized. Tr. 34; *see* Tr. 454, 465-66, 493-95, 497-505, 509-17, 553.
9 Plaintiff observes that surgery has not been offered as a treatment, ECF No. 14 at
10 5, which supports the ALJ's conclusion regarding conservative treatment. Plaintiff
11 also contends her treatment has not "fully resolve[d] her symptoms," ECF No. 14
12 at 5, but full resolution of symptoms is not required for a nondisability finding.
13 This is a clear and convincing reason supported by substantial evidence.

14 Fifth, the ALJ noted evidence of exaggeration of symptoms which
15 undermines Plaintiff's symptom claims. Tr. 31. An ALJ may reject a claimant's
16 testimony if there is evidence of a tendency to exaggerate symptoms. *Tonapetyan*
17 *v. Halter*, 242 F.3d 1144, 1148 (9th Cir. 2001). The ALJ noted that Dr. Carlson
18 found "embellishment on examination" and "there is no neuromuscular etiology
19 for her leg complaints or abnormal gait." Tr. 31, 454. This is a reasonable
20 consideration in evaluating Plaintiff's testimony.

1 Plaintiff observes without making any argument that despite Dr. Carlson's
2 finding of embellishment, "he did not dismiss Plaintiff's complaints." ECF No. 14
3 at 7. Plaintiff presumably references Dr. Carlson's recommendation that she
4 continue physical therapy for soft tissue pain and stated, "I certainly agree that an
5 illotibial band problem and possible other orthopedic etiologies may be a cause for
6 ongoing complaints." Tr. 454. Plaintiff's point is unclear as the ALJ did not find
7 that she has no basis for any complaints. Rather, the ALJ found Plaintiff's
8 testimony regarding the severity of her symptoms is not fully supported, in part
9 because Dr. Carlson noted a finding of exaggeration of symptoms. This is a clear
10 and convincing reason supported by substantial evidence.

11 **D. Step Four**

12 Plaintiff argues the ALJ erred at step four because the vocational expert's
13 opinion that Plaintiff can return to past relevant work was based on an incomplete
14 hypothetical. ECF No. 12 at 18. The ALJ's hypothetical must be based on
15 medical assumptions supported by substantial evidence in the record which reflect
16 all of a claimant's limitations. *Osenbrook v. Apfel*, 240 F.3d 1157, 1165 (9th Cir.
17 2001). The hypothetical should be "accurate, detailed, and supported by the
18 medical record." *Tackett*, 180 F.3d at 1101. The ALJ is not bound to accept as
19 true the restrictions presented in a hypothetical question propounded by a
20 claimant's counsel. *Osenbrook*, 240 F.3d at 1164; *Magallanes v. Bowen*, 881 F.2d
21 747, 756-57 (9th Cir. 1989); *Martinez v. Heckler*, 807 F.2d 771, 773 (9th Cir.

1 1986). The ALJ is free to accept or reject these restrictions as long as they are
2 supported by substantial evidence, even when there is conflicting medical
3 evidence. *Magallanes*, 881 F.2d at *id.*

4 Plaintiff's argument assumes that the ALJ erred in considering the medical
5 opinion evidence and Plaintiff's subjective complaints. ECF No. 12 at 18. The
6 ALJ's reasons for rejecting the postural limitations in Dr. Weeks' opinion and
7 Plaintiff's symptom claims were legally sufficient and supported by substantial
8 evidence, discussed *supra*. The ALJ therefore properly included occasional
9 postural limitations in the RFC and hypothetical to the vocational expert. The
10 hypothetical contained the limitations the ALJ found credible and supported by
11 substantial evidence in the record. The ALJ's reliance on testimony the VE gave
12 in response to the hypothetical was therefore proper. *See id.*; *Bayliss*, 427 F. 3d at
13 1217-18.

14 CONCLUSION

15 Having reviewed the record and the ALJ's findings, this Court concludes the
16 ALJ's decision is supported by substantial evidence and free of harmful legal error.
17 Accordingly,

18 1. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is **DENIED**.

19 2. Defendant's Motion for Summary Judgment, **ECF No. 13**, is
20 **GRANTED**.

IT IS SO ORDERED. The District Court Clerk is directed to enter this Order and provide copies to counsel. Judgment shall be entered for Defendant and the file shall be **CLOSED**.

DATED March 26, 2019.

s/ Rosanna Malouf Peterson
 ROSANNA MALOUF PETERSON
 United States District Judge

ROSANNA MALOUF PETERSON
United States District Judge